**Editor's note: 81 I.D. 187**

ESSEX INTERNATIONAL, INC.

IBLA 73-261 Decided April 16, 1974

Appeal from a decision by the Arizona State Office, Bureau of Land Management, dismissing a protest against private exchange A 4591.

Affirmed in part; reversed in part.

Applications and Entries: Generally--Exchanges of Land: Generally--Mining Claims: Lands Subject to--Private Exchanges: Generally--Private Exchanges: Protests

By regulation the filing of a formal exchange application under the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), segregates the selected land from appropriation under the mining laws. A mining claim located on such land thereafter is void ab initio and affords no basis for a protest against the exchange.

Applications and Entries: Generally--Mining Claims: Generally--Mining Claims: Litigation--Mining Claims: Patent--Private Exchanges: Protests--Rules of Practice: Protests--Waiver

The holder of a mining claim who fails to file notice of his adverse claim against a conflicting mineral patent application in accordance with 30 U.S.C. § 29 (1970), may not thereafter assert his claim as a bar to the issuance of the mineral patent, but he may assert his claim in a protest against a subsequent private exchange application for the same conflicting lands.

Mining Claims: Generally--Mining Claims: Litigation--Mining Claims: Patent

A holder of a mining claim is not required to institute adverse proceedings pursuant to 30 U.S.C. §§ 29 and 30 (1970), where the notice of publication of a mineral patent application expressly excludes the area of the claim in conflict.

Exchanges of Land: Generally--Mining Claims: Determination of Validity--Mining Claims: Hearings--Private Exchanges: Generally

Land within a mining claim validated by a discovery before a conflicting private exchange application is filed is not available for selection in exchange, but if the claim is not valid the land status is not affected. However, a mining claim cannot be declared invalid for a lack of a discovery without due notice to the claimant and opportunity for a hearing.

Exchanges of Land: Generally--Mineral Lands: Generally--Mineral Lands: Mineral Reservation--Mining Claims: Generally--Private Exchanges: Generally--Private Exchanges: Protests--Taylor Grazing Act: Generally

Land which might be mineral in character may be selected for a private exchange under section 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (1970), without a mineral reservation, if the public interest is served and the values of

the selected lands are not less than the offered lands. A protest against such an exchange is properly denied where no conflicting right to the selected land is shown.

Administrative Procedure: Administrative Procedure Act--
Constitutional Law: Due Process--Exchanges of Land: Generally--
Hearings--Rules of Practice: Protests

A protester against a private exchange who has no legally cognizable conflicting rights in the selected land has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds when his protest is considered in accordance with the rules of this Department.

APPEARANCES: Leo N. Smith, Esq., of Verity and Smith, Tucson, Arizona, for appellant; Jerry L. Haggard, Esq., of Evans, Kitchel and Jenckes, of Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Essex International, Inc., has appealed from a decision dated January 2, 1973, by the Arizona State Office, Bureau of Land Management (BLM), dismissing its protest against the consummation of an exchange of lands between the United States and Phelps Dodge Corporation under section 8(b) of the Taylor Grazing Act of 1934, 48 Stat. 1272, as amended, 43 U.S.C. § 315g(b) (1970).

The issues raised by Essex's protest and appeal arise from the following factual background. In April 1967, Phelps Dodge filed mineral patent application A 828 for 23 contiguous lode mining claims including the Foothill Nos. 34 and 35 claims within T. 5 S., R. 26 E., G. & S.R.M., Arizona. Notice of the patent application was posted on the ground and was published in a local newspaper during the period from October 11 to December 6, 1967. No adverse claim was filed. Mineral survey 4632 covered the group of the lode claims and a final mineral certificate for the claims issued March 25, 1968, subject to verification of a discovery. No formal action was taken by the Bureau with respect to the mineral patent application, but apparently Phelps Dodge was informally advised that Bureau mineral examiners had concluded there was insufficient proof of a discovery of a valuable mineral deposit to support issuance of a mineral patent.

On March 23, 1970, Phelps Dodge filed its application to exchange certain land it owned within the Sitgreaves National Forest for the selected land described as Tract 37, T. 5 S., R. 26 E., which covers land within its mineral patent application and mineral survey 4632. On October 21, 1970, the selected land was classified as suitable for the private exchange. Thereafter Phelps Dodge filed further information and documents as requested and an appraisal was made of the offered and selected lands. Notice of the proposed exchange was published in a local paper beginning on October 11, 1972. In response, on December 8, 1972, Essex protested the exchange, raising two primary objections: (1) that the selected land is mineral in character and not subject to exchange under the Taylor Grazing Act; and (2) that the exchange conflicts in part with two unpatented mining claims which it owns or has an interest in, namely, the Sandwash 2 and D&L claims. A copy of a private survey map included with its protest shows the Sandwash 2 overlapping the Foothill 35 claim, and the D&L overlapping the Foothill 34. Tract 37 is shown as covering only a portion of the two Foothill claims. The map shows each of Essex's claims to be in conflict with Tract 37 as to a small triangular area.

In dismissing Essex's protest, the Bureau indicated with respect to the first objection that even if the selected land is mineral in character the land may still be exchanged provided the

value of the public land does not exceed the value of the private land offered in the exchange. Regarding the second objection, the Bureau held, in effect, that Essex's claims constituted no bar to the exchange. Specifically, it held that the owners of the Sandwash 2 had failed to file an adverse claim during the period the mineral patent application was published and, therefore, had waived any rights to the area in conflict with the Foothill 35 claim pursuant to 30 U.S.C. §§ 29 and 30 (1970). Further, it held that the D&L claim was null and void ab initio as to the area in conflict with the exchange because it was located September 3, 1972, after a valid formal exchange application had been filed by Phelps Dodge, which segregated the land from mining location pursuant to 43 CFR 2091.2-3.

In reiterating that the private exchange application should be rejected, appellant contends that there has been no conclusive determination by the Bureau whether the selected land is mineral or nonmineral in character. It contends that the land is mineral in character, and that mineral land cannot legally be made the subject of a private exchange under section 8(b) of the Taylor Grazing Act, 43 U.S.C. § 315g(b) (170). Further, it contends, in any event, it is not in the public interest to allow a private exchange applicant to acquire land known to be mineral. It next contends, that even if mineral land can be acquired under the private exchange provisions of the Taylor Grazing Act, the exchange

in this case cannot be permitted as the decision classifying the land for exchange was based on a determination that the land was nonmineral in character. It also contends that the area in Tract 37 encompassed within its conflicting unpatented lode mining claims cannot be included within the exchange as any rights Phelps Dodge may have acquired in its proceedings under Mineral Application No. A 828 have been abandoned and waived by a relinquishment and the filing of the exchange application.

Phelps Dodge answered contending basically that the selected land has not been determined to be mineral in character, but if it is, the exchange may still be consummated provided the land values are equal. It also contends that the Bureau's decision should be upheld for reasons similar to those stated in that decision and additional reasons.

Essex's protest has two main thrusts. First, it asserts rights in itself as to two small areas allegedly conflicting with the selected land. This raises the question whether Essex has shown that it has valid rights which could compel rejection of the exchange application, at least as to areas of conflict. The second thrust of its protest concerns the entire exchange. It asserts no rights adversely affected by the exchange as to most of the land, but makes general legal and policy arguments against the exchange.

We turn first to the alleged conflicting interests. Essex has asserted it located the D&L claim on September 2, 1972. This date is after Phelps Dodge had filed its formal exchange application. The regulations of this Department provide that upon the filing of a valid formal exchange application, the selected lands are segregated from appropriation, including appropriation under the mining laws. 43 CFR 2091.2-3, 2202.5. Essex points to section 7 of the Taylor Grazing Act, 48 Stat. 1272, as amended, 43 U.S.C. § 315f (1970), as precluding a classification of lands to bar mineral entry. That provision, however, was to permit the location of mineral entries without a prior classification of land as mineral in character. Here it was not the classification action which caused the segregation from mineral entry, but regulations providing for the segregative effect upon the filing of a valid formal exchange application. The exchange application is made under another provision, section 8 of the Taylor Grazing Act. The effect of the regulations is to close lands from mineral and other location once a valid formal exchange application is filed. The regulations are within the authority of the Secretary of the Interior and are binding. Thus, the D&L and any other mining claim located after the filing of the valid formal exchange application for an unrestricted patent is void ab initio. Mining locations for lands which are not available for location under the mining laws confer no rights on the locator and may properly be declared void ab initio where the facts of the withdrawal or segregation of the land are shown

on the records of this Department. David W. Harper, 74 I.D. 141 (1967); Leo J. Kottas, 73 I.D. 123 (1966). Therefore, Essex has no rights under the D&L claim which afford any basis for its protest against the exchange because of a conflict with that claim. The decision is affirmed to this extent.

As to the alleged conflict between the Sandwash 2 claim and the selected land, the Bureau decision and the contentions of the appellant and the appellee assume there is a small area of the Sandwash 2 claim overlapping Tract 37 within the Foothill 35 claim. We shall discuss infra why this assumption may not be correct. However, even if there were a conflict between the Sandwash 2 claim and the Foothill 35 claim listed in the mineral patent application and the publication notice, the Bureau erred in finding that a mining claimant's failure to adverse the mineral patent application following publication precludes his right to protest a private exchange application thereafter as to the same area of conflict.

Revised Statutes 2325 and 2326, 30 U.S.C. §§ 29 and 30 (1970), require an applicant for mineral patent to publish notice of the application for a period of 60 days. The holder of a conflicting claim must: (1) file his intention to adverse the claim with the proper Bureau office within the publication period; (2) within 30 days therefrom initiate proceedings in a court of competent jurisdiction to determine the right of possession; and (3) prosecute

the proceedings with reasonable diligence to final judgment. Failure of the holder of a mining claim to file an adverse claim within the 60-day publication period amounts to a waiver of any rights to a claim as against the mineral patent applicant for a conflicting claim. The adverse claimant may not thereafter assert his own claim as a bar to the issuance of a mineral patent to the applicant, although he may protest to show that the patent applicant has not complied with the requirements for patent. Chemi-Cote Perlite Corp. v. Bowen, 72 I.D. 403, 406 (1965); People v. District Court of El Paso County, 190 Colo. 343, 35 P. 731 (1894). See also Dahl v. Raunheim, 132 U.S. 260 (1889); Gwillim v. Donnellan, 115 U.S. 45 (1885). Likewise, where a court determination has been made, the adverse claimant cannot assert his claim as an objection to the issuance of a mineral patent if the applicant is the successful litigant in the court proceedings. Ethelyndal McMullen, 62 I.D. 395, 400 (1955); Wight v. Dubois, 21 F. 693, 694 (D. Colo. 1884); Walsen v. Gaddis, 118 Colo. 63, 19 P.2d 306 (1948). Cf. Estate of Arthur C. W. Bowen, 14 IBLA 201, 81 I.D. 30 (1974).

The failure to adverse or to adverse successfully a mineral patent application estops an adverse claimant from asserting his claim against the issuance of a patent under the mining laws. The procedure pertains to mineral patent applications, and contemplates suits between rival mineral claimants to the same interests

in the land. Powell v. Ferguson, 23 L.D. 173 (1896). Therefore, where a nonmineral claimant failed to adverse a mining claim, it was held that this did not bar an adjudication and determination by the Department of the Interior upon application of a nonmineral entryman as to the mineral or nonmineral character of the land. Id. Neither the Bureau nor Phelps Dodge has cited any authority, nor do we know of any authority for holding that the failure to adverse a mineral patent application constitutes a waiver of a conflicting claim or an estoppel against a patent to be issued under some authority other than the mining laws. If we suppose the exchange applicant were someone other than the mineral patent applicant and the mineral patent application were rejected, could the exchange applicant set up the conflicting mining claimant's failure to adverse the mineral patent application to preclude his assertion of rights against the exchange application? We think not. Likewise, we do not think it makes any difference here because the exchange applicant is also the mineral applicant. Therefore, to the extent the Bureau decision held that Essex is precluded from protesting against the private exchange by asserting rights to a conflicting claim because it failed to adverse Phelps Dodge's mining claims, the decision is reversed.

The decision is also reversed on that point for an even more fundamental reason. Overlooked by the parties to the appeal and by the Bureau is the fact that in describing the Foothill 35

claim the published notice of the mineral patent application expressly excluded the area of the Sandwash 2 claim in conflict. 1/ Because the Sandwash 2 claim was excluded, there was no conflict and no reason for its owner to bring an adverse proceeding against the mineral patent application. The provisions of 30 U.S.C. §§ 29 and 30 (1970), requiring adverse proceedings by conflicting claimants had no applicability as to the Sandwash 2 claim because the notice indicated there was no conflict with that claim.

A review of mineral survey 4632 clearly establishes that the Sandwash 2 claim was identified as a conflicting claim but the conflict was to be removed by excluding the area of the Sandwash 2 claim from the survey of the Foothill 35 claim. Although mineral survey 4632 of the claims in the Phelps Dodge patent application has been canceled, the field notes of that survey and plats have been used to delineate Tract 37, the selected lands in the exchange. The exchange application, as amended October 25, 1971, gives a metes and bounds description which coincides with the calls of the survey as to the area in question here. The field notes of the survey show that the surveyors excluded part of the Foothill 35 claim from the survey, using the northern boundary of the unpatented Sandwash 2 claims as the southern boundary of Foothill 35, which is the same boundary for Tract 37 in that area.

1/ The mineral final certificate also expressly excluded the Sandwash 2 claim.

While Essex contends there is a conflict between the Sandwash 2 claim and Tract 37, the only support for its contention is a copy of the private survey plat submitted with its protest. That plat purports to show a small area marked in blue overlapping Tract 37. The overlap is created by a line drawn apparently to show the northern boundary of the Sandwash 2 claim at variance with the mineral survey plat line and calls. There is no explanation for this variance. The field notes of the survey indicate the survey was run from monuments for the Sandwash 2 claim an the calls were made from such monuments and public survey quarter section corners. Essex has not filed a copy of the notice of location of the Sandwash 2 claim which would give the metes and bounds description of that unsurveyed claim, nor any other information to support a conflict. Without more substantiation that mineral survey 4632 and the boundaries of Tract 37 intrude upon the northern boundary of the Sandwash 2 claim, we cannot find there is such a conflict.

If there is no actual conflict between the Sandwash 2 claim and the private exchange, there is no basis for Essex's protest on the ground of a conflicting right. Cf. 43 CFR 3873.3. If, however, there is a conflict, it would be essential to determine whether the Sandwash 2 claim is a valid claim before the exchange could be consummated as to the area in conflict. If a mining claim is validated by discovery before the land is segregated by an exchange application, the land is appropriated by the claim and is not available for selec-

tion in an exchange. Harry Yukon, A-30762 (August 23, 1967). A mineral location made prior to a withdrawal or segregation of the land but not validated by a discovery, however, is a nullity and does not affect the land status. Id. Nevertheless, such a mining claim cannot be declared invalid because of a lack of discovery without due notice to the claimant and an opportunity for a hearing. See Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1920).

In view of the rulings made above, Essex will be allowed 30 days from the date of this decision to submit to the Bureau's State Office, if it desires, proof to establish that there is actually a conflict between Tract 37 and the Sandwash 2 claim. Such proof would include the notice of location of the Sandwash 2 claim describing an area which is in conflict and proof tending to show that the surveyed area actually includes part of the Sandwash 2 claim. If Essex fails to substantiate its assertion that there is an actual conflict, there would be no basis for its protest based upon such a conflict and the dismissal of the protest on that ground will stand. If, however, Essex shows an actual conflict, or the facts to establish the conflict cannot be resolved from official records and matters which can be established by official notice (see 43 CFR 4.24(b)), a hearing will be required to estab-

lish whether the conflicting Sandwash 2 claim is valid before the exchange can be consummated as to the area in conflict. 2/

We turn now to Essex's objections to the private exchange generally pertaining to legal and policy considerations for exchanging land which might be mineral in character. The land was classified as nonmineral in character in view of a field report of a Bureau mineral examiner dated July 22, 1970, which states:

> * * * the information available indicates that either a halo of subeconomic minerals surrounds a proven ore body and extends into the subject lands, or that similar grade mineralization is present, but very deeply buried. In any event, the presence of valuable mineral deposits on the claims has not been shown. Neither can the presence of valuable mineral deposits be inferred, particularly if realistic economic criteria are applied to the known data.

Essex contends that drilling it has conducted on lands south of Tract 37 establishes the mineral character of the land. At most, information of such drilling might lend support to inferences concerning an extension of possible mineralization into Tract 37, but it fails by itself to establish that extraction of minerals within Tract 37 is economically feasible and the land has a practical

2/ This does not mean that a hearing would be necessary if the area of conflict is omitted from the exchange application with the applicant agreeing to the omission without requiring additional selected land so as to affect the valuation determination of the selected and offered lands.

value for mining purposes. Such evidence is essential to establish the mineral character of the land. California v. Rodeffer, 75 I.D. 176 (1968). See United States v. Bunkowski, 5 IBLA 102, 79 I.D. 43 (1972).

Even if the land is deemed to be mineral in character, this is not a legal impediment to a private exchange of the selected land without a mineral reservation where a discovery has not been made. Many grants and dispositions of public land by express statutory language, or by administrative or judicial interpretation, are limited to nonmineral lands. We cannot accept Essex's contention that the private exchange provision in section 8(b) of the Taylor Grazing Act is so limited. The language and context of the Act suggests otherwise. By section 8(b), the Secretary is authorized "when public interests will be benefited thereby," to exchange for certain private lands "an equal value of surveyed grazing district land or of unreserved surveyed public land * * *." 43 U.S.C. § 315g(b) (1970). Section 8(c) of the Act pertaining to state exchanges differentiates between an exchange based upon equal value or of equal acreage by requiring that when an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States. 43 U.S.C. § 315g(c). Section 8(d) of the Act applies both to state and private exchanges and provides in part:

> * * * That either party to an exchange based upon equal value under this section may make reservations of minerals, easements, or rights of use. Where reservations are made in lands conveyed either to or by the United States the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary. * * *

43 U.S.C. § 315g(d) (1970). This provision leaves to the discretion of the Secretary whether to reserve minerals to the United States where the exchange is based on a value for value exchange rather than a state exchange based on equal acreage. Dredge Corp. v. Husite Co., 78 Nev. 69, 369 P.2d 676, 684, cert. denied, 371 U.S. 821 (1962). This discretionary authority is unlike the situations where no reservations of minerals could be made in the absence of a specific statutory authorization which compelled distinctions between authority to dispose of mineral and nonmineral lands. The only restriction upon the Secretary's authority to exchange lands for private lands, other than the public interest requirement, is that the lands be of equal value. Cf. Associate Solicitor's Opinion, M-36436 (May 9, 1957).

Regulation 43 CFR 2430.5(g) provides:

> Lands determined to be valuable for purposes other than public purposes may be determined to be suitable for exchange if the acquisition of the offered lands, the disposition of the public lands, and the anticipated costs of consummating the exchange will not disrupt governmental operations.

See also 43 CFR 2430.6. The information tendered by Essex with its protest in no way vitiates the propriety of the Bureau's classification of the land as suitable for exchange. If upon re-examination of available information the Bureau should conclude that the selected land may be mineral in character, there is no necessity for Phelps Dodge to file a new application, as Essex contends. The segregative effect of the original application, as amended, stands. The classification may be amended to reflect the mineral character of the land and the value of the offered and selected lands reappraised to assure that the value of the selected land is not less than the offered land considering possible mineral values in the selected land.

Nothing that Essex has shown establishes that the exchange is not in the public interest, assuming that the land values are equal. An exchange to acquire land within the boundaries of a national forest is within the public interest criterion of the Taylor Grazing Act. Elbert O. Jensen, 60 I.D. 231 (1948). See also LaRue v. Udall, 324 F.2d 428, 435 n. 16 (D.C. Cir. 1963) (concurring opinion). Essex's protest based upon general legal and policy considerations is denied.

Essex has made a motion to have a hearing in this matter. We have indicated it is entitled to a hearing based upon alleged conflicting rights only if it can establish there is a conflict between

the Sandwash 2 claim and the selected land. We deny its request for a hearing based on its general protest against the exchange in view of our conclusions above. A protester against an exchange who has no legally cognizable conflicting right in selected lands has no right to a formal hearing under the Administrative Procedure Act, 5 U.S.C. § 554 (1970), or on due process grounds, when his protest is considered in accordance with the rules of this Department. LaRue v. Udall, supra.

Essex has also filed a motion to supplement the record with the court transcript from Hawkins v. Phelps Dodge Corp., Civil No. 72-203-TUC, and Essex International, Inc. v. Phelps Dodge, Civil No. 72-204 TUC (D. Ariz., judgment for defendant filed January 24, 1973). 3/ We see no useful purpose the transcript could serve in connection with this appeal and, therefore, deny the request.

3/ The court action arose from suits by Essex and others filed in the United States District Court in Arizona, asking the court to declare Essex's interest in the land encompassed in its lode mining claims superior to Phelps Dodge's rights. Phelps Dodge filed a counterclaim and both parties requested preliminary injunctions. On January 24, 1973, the court issued a preliminary injunction, in part, granting Phelps Dodge's request for a preliminary injunction and barring Essex from entering upon the area in conflict. The injunction was ordered to continue in effect pending "final determination by the United States Department of Interior of both the defendant's mineral patent application A 828 and private exchange application A 4591."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR. 4.1, the decision appealed from is affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this decision.

Joan B. Thompson
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge